TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 864

THE UNITED STATES, APPELLANT

vs.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY

No. 865

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY, APPELLANTS

vs.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

FILED JANUARY 4, 1926

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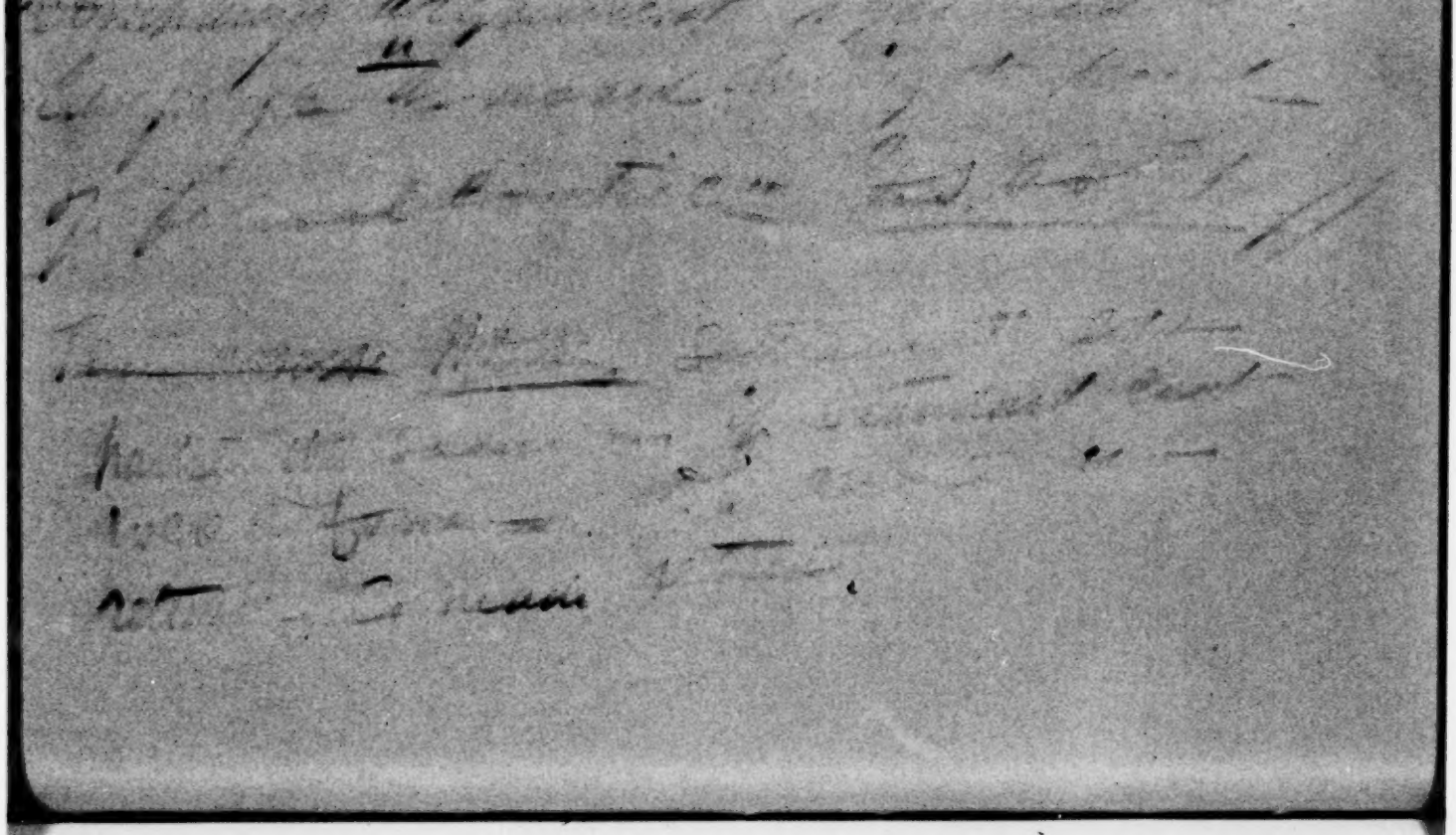

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INDEX

1 In Court of Claims of the United States

No. C–32

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, A CORPORATION; the West Side Belt Railroad Company, a Corporation,

vs.

THE UNITED STATES

I. *Minute entries*

On February 12, 1923, the plaintiff filed its original petition in the name of the Pittsburgh & West Virginia Railway Company, a corporation.

Subsequently, to wit, on May 2, 1923, by leave of court, the plaintiff filed its amended petition.

Subsequently, to wit, on February 6, 1925, by leave of court, the plaintiff filed a second amended petition in the name of the Pittsburgh & West Virginia Railway Company, a corporation; the West Side Railroad Company, a corporation.

Said second amended petition is as follows:

II. *Second amended petition*

Filed Feb. 6, 1925

To the honorable Chief Justice and Associate Justices of the Court of Claims:

The plaintiff, the Pittsburgh and West Virginia Railway Company, by leave of court first had and obtained, respectfully represents:

First count

2 1. It is, and, at all times hereinafter mentioned, was a corporation duly organized and existing under the laws of the States of Pennsylvania and West Virginia, and having its principal business office in the city of Pittsburgh, State of Pennsylvania, and engaged in the business of a common carrier by railroad. The Pittsburgh and West Virginia Railway Company owns all of the stock of the West Side Belt Railroad Company, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and engaged in the business of a common carrier by railroad. For the purposes of taxation the Pittsburgh and West Virginia Railway Company and the West Side

Belt Railroad Company were required at the times hereinafter mentioned by the Commissioner of Internal Revenue, pursuant to his authority under the revenue acts, to render a consolidated tax return and to pay taxes based thereon.

2. From January 1, 1918, to February 29, 1920, inclusive, the plaintiff and its subsidiary, West Side Belt Railroad Company, were operated and controlled by the United States under the Federal control act of March 21, 1918, and the proclamation of the President of December 26, 1917. The plaintiff had on, to wit, April 1, 1917, undergone a reorganization and was a carrier whose earnings for the three years preceding June 30, 1917, were not fully reflected in the operating railway income for the said three years and could not accurately be determined therefrom, and under section three of the Federal control act it was forced to negotiate with the United States in order to establish the amount of just compensation payable to it for operations under Federal control.

3 3. During the years 1918 and 1919 negotiations were had between plaintiff and the United States to determine the amount of just compensation to which plaintiff and its subsidiary, the West Side Belt Railroad Company, were entitled. In January, 1920, plaintiff was paid the sum of $250,000 on account by the United States as part of the just compensation for operation under Federal control. In 1920 and 1921 further negotiations were continued between plaintiff and defendant, and during the year 1921 the United States and the plaintiff agreed that the just compensation for plaintiff and its subsidiary for the whole period of Federal control should be $1,820,000. (The final settlement agreements between the Director General of Railroads and the Pittsburgh and West Virginia Railway Company and the West Side Belt Railroad Company are attached hereto marked "Exhibits A and B," and prayed to be made a part of this petition. Said settlement agreements, as will be seen by reference thereto, provide for payment to the Pittsburgh and West Virginia Railway Company of the sum of $720,000 and to West Side Belt Railroad Company of $1,080,000, a total to the two of $1,800,000, which amount was comprised of $1,570,000 balance of compensation and $230,000 in adjustment of other claims not concerned herein.) In accordance with these agreements the United States paid the plaintiff and its subsidiary the sum of $1,570,000 as and for compensation for the use of their properties in addition to the sum of $250,000 paid on account in 1920.

4 Under the Federal control act and internal revenue acts of 1916, 1917, and 1918, all railroads operating under Federal control were required to return and pay out of their own funds and bear all Federal corporation taxes save and except the original normal corporation tax of two per cent. The said normal tax of two per cent was to be paid and borne, under the said laws by the United States, as a part of the operating expenses of

each carrier. It was the custom, however, for each carrier to return and pay the said two per cent normal tax, together with the taxes payable and bearable out of its own funds, upon the receipt of its just compensation, whereupon the United States, through the Director General of Railroads, duly credited the carrier to the extent of the said two per cent normal tax so paid. Plaintiff so returned and paid the two per cent normal tax upon the $250,000 paid on account by defendant in January, 1920, and was duly credited by the Director General of Railroads to the extent of the said two per cent tax so paid. The Federal corporation tax upon the net income of railroads, accrued or received in the year 1918, including the normal tax of two per cent, was twelve per cent, and the Federal corporation tax upon the net income of railroads, accrued or received in the year 1919 or succeeding years, was ten per cent.

5. When plaintiff and its subsidiary received $1,570,000 of the just compensation allowed and paid for operations under Federal control, to wit, in the year 1921, the companies were no longer under Federal control, and there was no way in which the normal two per cent corporation tax, if returned and paid by plaintiff, could be credited to it by the Director General of Railroads. Because of certain deductions allowed by law, the taxable net income of plaintiff and its subsidiary for the year 1921 was $1,064,781.39. Before paying the tax thereon, plaintiff in, to wit, March, 1922, made formal and timely application to the Commissioner of Internal Revenue for a ruling as to the rate of tax to be paid by it upon the said $1,064,781.39, being the balance of the $1,570,000 received in the year 1921 as just compensation for operations under Federal control that was taxable. Plaintiff maintained that it should be credited to the extent of the normal two per cent tax payable by the United States, and should make a return and pay a tax at the rate of eight per cent only upon the net income so received in 1921. The Commissioner of Internal Revenue ruled that the tax of ten per cent should be returned and paid by plaintiff, and plaintiff, under protest, has returned and paid the tax of ten per cent upon the moneys received as just compensation for operations under Federal control, the said tax amounting to $106,478.14. Plaintiff duly filed with the Commissioner of Internal Revenue a claim for the refund of such portion of the tax unlawfully collected, viz., the normal tax of two per cent, which claim for refund was denied by the Commissioner of Internal Revenue on October 6, 1922.

6. Plaintiff is entitled to receive and now claims from the United States the sum of $21,295.62, being two per cent of $1,064,781.39, the difference between the eight per cent tax on the moneys received as just compensation for operations under Federal control and the ten per cent tax on said sum actually paid under protest. No part of the said sum so paid has been returned to plaintiff by the United States, and plaintiff is justly entitled to receive and recover from the United States for and on account of this claim the sum of

$21,295.62, together with interest at the rate of ½ of 1 per cent per month from the date of payment of the tax to the date of
6 payment of such money judgment as the court might enter, after allowing all just credits and set-offs.

7. This claim is made under and depends upon the following acts of Congress, to wit: The Federal control act of March 21, 1918 (40 Stat. L. 451); the transportation act of 1920 (41 Stat. L. 456); and the internal revenue acts of September 8, 1916 (39 Stat. L. 756); and October 3, 1917 (40 Stat. L. 300), and of February 24, 1919 (40 Stat. L. 1057).

Second count

And further showing to your honors, plaintiff respectfully represents:

1. That on, to wit, July 1, 1921, the plaintiff and its subsidiary entered into contracts with the United States acting through the Director General of Railroads, copies of which contracts are hereto annexed, marked "Exhibits A and B," and made a part hereof. In said contracts the United States agreed to save plaintiff and its subsidiary harmless from all taxes, except what were known as war taxes, assessed under Federal or any other Governmental authority for any part of the period of Federal control on the property under such control, or on the revenue derived from operation of the same. The United States further agreed to pay or save the plaintiff harmless from the expense of all suits respecting the classes of taxes payable under the agreements.

2. Subsequent to the ruling of the Commissioner of Internal Revenue referred to in the first count of this petition, plaintiff called upon the United States through the Director General of Rail-
7 roads to reimburse it for the payment of the two per cent tax on the revenues derived from operations during Federal control amounting to the sum of $21,295.62, but the United States has refused and refuses to so reimburse plaintiff or to save it harmless from the payment of said two per cent tax, all of plaintiff's damage in the sum of $21,296.62, plus such reasonable sum as the court might in its discretion fix for counsel fees and other expenses in connection with this suit.

3. No action has been taken by Congress with regard to this claim, or by any of the departments other than the Treasury Department and the Director General of Railroads as aforesaid. The plaintiff is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same or any part thereof or interest therein has been made. The plaintiff is justly entitled to receive and recover for and on account of this claim the sum of $21,295.62 and interest as aforesaid, plus such reasonable sum as the court might in its discretion fix for counsel fees and other expenses in connection with this suit; and for the aggregate of these sums

plaintiff prays judgment, as well as for such other relief as this honorable court might grant both at law and in equity in the premises.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
THE WEST SIDE BELT RAILWAY COMPANY,
By HARVEY D. JACOB,
Attorney for Plaintiff.

FRANK M. SWACKER,
Of Counsel.

[*Duly sworn to by Harvey D. Jacob; jurat omitted in printing.*]

9 *Exhibit A to second amended petition*

FINAL SETTLEMENT BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE PITTSBURGH AND WEST VIRGINIA RAILWAY COMPANY, JULY 1, 1921

This agreement, entered into this 1st day of July, A. D. 1921, by and between James C. Davis, Director General of Railroads and agent of the President, acting on behalf of the United States and the President, hereinafter called the "director general," and the Pittsburgh and West Virginia Railway Company, hereinafter called the "company."

Witnesseth:

The Pittsburgh and West Virginia Railway Company hereby acknowledges payment of the sum of seven hundred and twenty thousand ($720,000.00) by the said director general, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said company now has or hereafter may have or claim against the director general, or any one representing or claiming to represent the director general, the United States, or the President, growing out of or connected with the possession, use, and operation of the company's property by the United States during the period of Federal control; and the said company hereby acknowledges the return to and receipt by it of all its property and rights which it is entitled to, and further acknowledges that the di-
10 rector general has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.

The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character, as between the parties hereto growing out of Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby:

Exceptions

1. The obligation on the part of the company, as expressed in the standard form of contract between the director general and the railroads, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the director general or the United States), as same is stated in paragraph (f) of section 9 of said contract, or as heretofore agreed to by the company, is to continue, and is not affected by this settlement.

2. This settlement does not include or effect any moneys or assets of the director general turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

3. This settlement does not include the obligations of the director general assumed in paragraphs (i) and (j) of section 4 of said standard contract, to save the company harmless as to claims, if any, of third persons, or the obligations of the director gen-
11 eral, in respect to the payment of taxes under section 6 of the contract.

In witness whereof, the parties to this agreement have duly signed, sealed, and executed the same in triplicate, such agreement being duly executed by the president of the company and attested by its assistant secretary, with the corporate seal hereto annexed, and the said president hereby certifies that he has been duly authorized to execute and deliver this agreement on the part of the company by a vote of its board of directors, at a lawful meeting of said directors held on the 30th day of June, A. D. 1921.

[SEAL.] JAMES C. DAVIS,
Director General of Railroads
and Agent of the President.

[SEAL.] THE PITTSBURGH AND WEST
VIRGINIA RAILROAD COMPANY,
By H. E. FARRELL, *President.*

Attest:
JOHN J. O'BRIEN,
Assistant Secretary.

(NOTE.—The provisions of the standard form of contract referred to in "exceptions" to Exhibit A are as follows):

SECTION 9 (f). After Federal control no claim by or against the director general shall be settled by the company against the written objection of the director general or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of
12 operations during Federal control shall be in charge of the company's legal force and the expense thereof shall be paid by the company; but the director general or the Attorney General

may, at the expense of the United States, employ special counsel in connection with any such litigation.

SECTION 4 (i). The director general shall pay, or save the company harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the company. He shall also pay or save the company harmless from all rents called in the monthly reports to the commission equipment rents or joint-facility rents, and all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the company by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the company's property during Federal control, except judgments or decrees founded on obligations of the company to the director general of the United States.

SECTION 4 (j). Except as otherwise provided in this agreement, the director general shall save the company harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the company growing out of anything done or omitted during Federal control in connection wtih, or incident to, operation or existing contracts relating to operation, and shall do and perform, so far as is requisite under Federal control for the pro-
13 tection of the company, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the company of any of its property rights, ordinance rights, or franchises, or of its trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the director general to make any capital expenditure necessary to preserve a franchise or ordinance right not heretofore availed of by the company. The director general shall also save the company harmless from any and all claims for breach of covenant heretofore entered into by the company or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the director general of, or to make him liable on, any obligation of the company to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the commission equipment rents and joint facility rents and rents which under the accounting rules of the commission in force during the test period were classified as operating expenses, or to make the director general liable to the company in respect of any interest on any bonds issued by, or in respect of any obligations of, other corporations, or in respect of contributions to make up deficits in the earnings of

other corporations, except as payments in respect of such interest or other amounts were classified under said rules as equipment or joint facility rents, or were a class of payments to be otherwise reflected in railway operating income.

14 The company shall, during Federal control, pay the rents of any property held by it under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period were, under the rules of the commission, classified as equipment rents or joint facility rents, and rents which were classified as operating expenses, which excepted rents shall be paid by the director general. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control, the company shall, if possible, and if requested by the director general, renew the same; the rental, however, of property in the excepted classes above mentioned shall be paid by the director general. The company shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the director general, but any increase in the rental of such other property shall be paid by the director general.

SECTION 6 (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years, and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the company under the act of Congress entitled "An act to provide revenue to defray war expenses and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may

15 be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the commission in force December 31, 1917, to investment in road and equipment, shall be paid by the company; but upon the amount thus chargeable to investment interest shall be paid to the company during Federal control at the rate provided in paragraph (d) of section 7 hereof. Taxes assessed during construction or additions, betterments, and road extensions made by the company with the approval or by order of the director general during Federal control, shall be considered a part of the cost of such additions, betterments, and extensions and shall, under the provisions of paragraph (d) of section 7 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the company is not paid by it when due, the same may be

paid by the director general and deducted from the next installment of compensation due under section 7 hereof. If any taxes properly chargeable to the director general have been or shall be paid by the company, it shall be duly reimbursed therefor.

(c) The director general shall either pay out of revenues derived from railways operation during the period of Federal control or shall save the company harmless from all taxes lawfully
16 assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The director general shall pay or save the company harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the director general, and the remainder shall be paid by the company.

(e) Whenever a period for which a tax is assessed can not be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

17 *Exhibit B to second amended petition*

Final settlement

This agreement, entered into this 1st day of July, A. D. 1921, by and between James C. Davis, Director General of Railroads and agent of the President, acting on behalf of the United States and the President, hereinafter called the "director general," and the West Side Belt Railroad Company, hereinafter called the "company."

Witnesseth:

The West Side Belt Railroad Company hereby acknowledges payment of the sum of one million eighty thousand dollars ($1,080,000) by the said director general, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said company now has or hereafter may have or claim against the director general, or anyone representing or claiming to represent the director general, the United States, or the President, growing out of or connected with the possession, use, and operation of the company's property by the United States during the period of Federal control; and the said company hereby acknowledges the return to and receipt by it of all its property and rights which it is entitled to, and further acknowl-

edges that the director general has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.

The purpose and effect of this instrument is to evidence a
18 complete and final settlement of all demands, of every kind and character, as between the parties hereto growing out of the Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby:

Exceptions

1. The obligation on the part of the company, as expressed in the standard form of contract between the director general and the railroads, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the Director General of the United States), as same is stated in paragraph (f) of section 9 of said contract, or as heretofore agreed to by the company, is to continue, and is not affected by this settlement.

2. This settlement does not include or affect any moneys or assets of the director general turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

3. This settlement does not include the obligations of the director general assumed in paragraphs (i) and (j) of section 4 of said standard contract, to save the company harmless as to claims, if any, of third persons, or the obligations of the director general in respect to the payment of taxes under section 6 of the contract.

In witness whereof the parties to this agreement have duly signed, sealed, and executed same in triplicate, such agreement being duly executed by the vice president of the company and attested by its assistant secretary, with the corporate seal hereto attached, and
19 the said vice president hereby certifies that he has been duly authorized to execute and deliver this agreement on the part of the company by a vote of its board of directors, at a lawful meeting of said directors held on the 20th day of June, A. D. 1921.

JAMES C. DAVIS,
Director General of Railroads
and Agent of the President.
WEST SIDE BELT RAILROAD COMPANY,
By H. E. FARRELL, *Vice President.*

Attest:
JOHN J. O'BRIEN,
Assistant Secretary.

(NOTE.—The exceptions referred to in Exhibit B are the same provisions of the standard contract referred to in Exhibit A and hereinbefore set out in note to Exhibit A.)

20 III. *General traverse*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IV. *Argument and submission*

On March 18, 1925, this case was argued and submitted on merits by Mr. Harvey D. Jacob for the plaintiff, and by Mr. A. A. McLaughlin for the defendant.

21 V. *Findings of fact, conclusion of law, and opinion of the Court by Booth, J.*

Entered May 4, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact

I

Plaintiff is and, at all times hereinafter mentioned, was a corporation duly organized and existing under the laws of the States of Pennsylvania and West Virginia, and having its principal business office in the city of Pittsburgh, State of Pennsylvania, and engaged in the business of a common carrier by railroad. The Pittsburgh and West Virginia Railway Company owns all of the stock of the West Side Belt Railroad Company, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and engaged in the business of a common carrier by railroad. For the purposes of taxation the Pittsburgh and West Virginia Railway Company and the West Side Belt Railroad Company were required at times hereinafter mentioned by the Commissioner of Internal Revenue, pursuant to his authority under the revenue acts, to render a consolidated tax return and plaintiff to pay taxes based thereon.

II

From January 1, 1918, to February 29, 1920, inclusive, the plaintiff and its subsidiary, West Side Belt Railroad Company, were operated and controlled by the United States under the Federal control act of March 21, 1918, and the proclamation of the President of December 26, 1917. The plaintiff had, on, to wit, April 1, 1917, undergone a reorganization and was a carrier whose earnings for the three years preceding June 30, 1917, were not fully reflected in the operating railway income for the said three years, and could not

accurately be determined therefrom, and under section one of the Federal control act it did negotiate with the United States in order to establish the amount of just compensation payable to it for operations under Federal control.

III

During the years 1918 and 1919 negotiations were had between plaintiff and the United States to determine the amount of just compensation to which plaintiff and its subsidiary, the West
22 Side Belt Railroad Company, were entitled. In January, 1920, plaintiff was paid the sum of $250,000 on account by the United States as part of the just compensation for operation under Federal control. In 1920 and 1921 further negotiations were continued between plaintiff and defendant, and during the year 1921 the United States and the plaintiff agreed that the just compensation for plaintiff and its subsidiary for the whole period of Federal control should be $1,820,000. (The final settlement agreements between the Director General of Railroads and the Pittsburgh and West Virginia Railway Company and the West Side Belt Railroad Company are attached to the petition as Exhibits A and B, and are made a part hereof by reference. Said settlement agreements provide for payment to the Pittsburgh and West Virginia Railway Company of the sum of $720,000 and to the West Side Belt Railroad Company of $1,080,000, a total to the two of $1,800,000, which amount was comprised of $1,570,000 balance of compensation and $230,000 in adjustment of other claims not concerned herein.) In accordance with these agreements the United States paid the plaintiff and its subsidiary the sum of $1,570,000 as and for compensation for the use of their properties in addition to the sum of $250,000 paid on account in 1920.

IV

Under the Federal control act and internal revenue acts of 1916, 1917, and 1918 all railroads operating under Federal control were required to return and pay out of their own funds and bear all Federal corporation taxes save and except the original normal corporation tax of two per cent. It was the custom for each carrier to return and pay the said two per cent normal tax, together with the taxes payable and bearable out of its own funds, upon the receipt of its just compensation, whereupon the United States, through the Director General of Railroads, duly credited the carrier to the extent of the said two per cent normal tax so paid. The Federal corporation tax upon the net income of railroads, accrued or received in the year 1918, including the normal tax of two per cent, was twelve per cent, and the Federal corporation tax upon the net income of railroads, accrued or received in the year 1919 or succeeding years, was ten per cent.

V

When plaintiff and its subsidiary received $1,570,000 of the just compensation allowed and paid for operations under Federal control, to wit, in the year 1921, the companies were no longer under Federal control and there was no way in which the normal 2 per cent corporation tax, if returned and paid by plaintiff, could be credited to it by the Director General of Railroads. Because of certain deductions allowed by law, the taxable net income of plaintiff and its subsidiary for the year 1921 was $1,064,781.39.

VI

On or about June 13, 1919, consolidated income and excess-profits tax return was made to the collector of internal revenue for the proper district, on behalf of the Pittsburgh & West Virginia
23 Railway Company, plaintiff, and West Side Belt Railroad Company, covering income of said two companies for the year 1918, which report showed a net balance subject to income tax of $20,943.33, and showed the amount of income tax due thereon from the said two companies was $2,513.20, such amount being 12 per cent of the said net balance subject to income tax. At the proper time the said railway companies paid said tax, amounting to $2,513.20, to the internal revenue collector, and thereafter the Director General of Railroads reimbursed the said railway companies for such payment in the amount of one-sixth thereof, or $418.86, such amount representing the 2 per cent normal tax provided for in the revenue act of 1916.

VII

On or about May 10, 1920, consolidated income and excess-profits tax return was made to the internal revenue collector for the proper district, in behalf of the Pittsburgh & West Virginia Railroad Company, plaintiff, and the West Side Belt Railroad Company, covering the income of said companies for the year 1919, showing a net balance subject to income tax of $68,148.57 and showing $6,814.86 due thereon as income tax from said railway companies for said year 1919, said amount being 10 per cent of such net balance subject to such income tax. Said amount of $6,814.86 was thereafter and within the time provided by law paid to said internal revenue collector by the said railway companies, and thereafter said companies were reimbursed for such payment by the Director General of Railroads in the amount of $1,362.97, said sum being one-fifth of said income tax so paid by said companies and being the 2 per cent normal tax on said net balance of income of said companies as provided for in the revenue act of 1916.

VIII

On or about the 14th day of May, 1921, consolidated income and excess-profits tax return was made to the collector of internal revenue of the proper district in behalf of the Pittsburg & West Virginia Railway Company, plaintiff, and the West Side Belt Railroad Company, covering the income of said companies for the year 1920, which showed a net balance of taxable income of the said two companies for said year, subject to income tax of $531,667.22, and showing income tax due thereon from said companies amounting to $53,166.72. Thereafter and in the time provided by law the said railway companies paid said amount of $53,166.72 to the said internal revenue collector, and the plaintiff herein thereafter sought to charge against the Director General of Railroads $5,938.89 of said amount and entered a charge of such amount against the Director General of Railroads in the trustee account of the director general, said trustee account then being in the possession and charge of said plaintiff.

IX

On or about July 6, 1923, the Director General of Railroads, through his accounting representatives entrusted with the duty of auditing said trustee account of said director general so in the
24 possession and charge of said Pittsburgh & West Virginia Railway Company, plaintiff, objected to said act of said Pittsburgh & West Virginia Railway Company in charging to the Director General of Railroads in said account the said amount of $5,938.89 and demanded a correction thereof and demanded that the director general be credited in said account in the amount of $4,160.67, the director general contending that he should have been charged, on account of the payment of said sum of $53,166.72 as income tax levied upon the income of the said railway companies for the year 1920, but $1,772.22, such last-mentioned amount being one-sixth of the 2 per cent normal tax on such income for said year 1920.

X

On or about the 24th day of February, 1920, the Director General of Railroads promulgated his General Order No. 68, authorizing carriers which were under Federal control and operation to establish an account to be known as "trustee account," in which said account the director general should be credited with all funds belonging to the director general in the hands of the carrier at the time, and all assets of the director general that might thereafter come into the possession of the carrier, and in which said account the director general should be charged with all disbursements made by the carrier in behalf of the director general by his express or general instructions, and subject at all times to the provision of said circular and directions of said Director General of Railroads, or his authorized representatives.

XI

In 1923 the income-tax unit of the Bureau of Internal Revenue ruled that plaintiff must pay income tax for the years 1918 and 1919 on a portion of the compensation paid to plaintiff by the director general in July, 1921, for the use of its property during Federal control, said bureau contending that a portion of said compensation should have been accrued as income of plaintiff for each of said years. The plaintiff objected to such ruling and contended that all of the compensation so paid to it in the year 1921 constituted income for said 1921, and plaintiff appealed from such ruling to the committee of appeals and review, which committee, in opinion dated April 2, 1924, approved by the Commissioner of Internal Revenue, upheld such contention of the plaintiff, reversed the ruling of the income-tax unit, and held that the entire amount of such compensation so paid by said director general to said plaintiff in July, 1921, constituted income for the year 1921.

XII

The plaintiff, in adjusting with the Bureau of Internal Revenue, its income tax assessed upon its taxable net income for the year 1921, contended that the compensation received by the plaintiff from the United States Railroad Administration in July, 1921, for the use of its railroad by the Government during Federal control was income for the year 1921, and procured a ruling upholding its said contention and adjusting said plaintiff's income tax for said year on such basis.

25

XIII

Neither the plaintiff nor the West Side Belt Railroad Company received any compensation during either 1918 or 1919 for the use of their properties or either of them by the Government during Federal control, and the income and excess profits tax returns of said companies filed for said years did not include any amount of such compensation, but said returns included only income from other sources.

XIV

Subsequent to the ruling of the Commissioner of Internal Revenue, hereinabove referred to, plaintiff called upon the United States through the Director General of Railroads to reimburse it for the payment of the two per cent tax on the revenues derived from operations during Federal control amounting to the sum of $21,295.62, but the United States has refused to so reimburse the plaintiff or to save it harmless from the payment of said two per cent tax.

XV

The taxes herein claimed were paid under protest, and a claim for refund was duly made to the Commissioner of Internal Revenue, which was denied.

Conclusion of law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is entitled to recover $21,295.62.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of twenty-one thousand two hundred and ninety-five dollars and sixty-two cents ($21,295.62), with interest thereon as allowed by law.

Opinion

BOOTH, Judge, delivered the opinion of the court:

The plaintiff, the Pittsburgh & West Virginia Railway Company, and its subsidiary, the West Side Belt Railroad Co., seek in the petition the recovery of $21,295.62 paid as the 2 per cent normal tax on the consolidated report of its income for the calendar year 1921. One item entering into the net taxable income of the plaintiff was $1,064,781.39 paid to it in accord with a written contract of settlement entered into by the plaintiff and the railroad administration as just compensation for the use of its railroads during the period of Federal control.

The facts, which are not in dispute, are as follows: From January 1, 1918, to February 29, 1920, the whole period of Federal control, the railroads involved were in the possession, control, and operation of the Government. The Federal control act of March 21, 1918, 41 Stat. 451, sec. 1, contained the following provision:

"Any Federal taxes under the act of October 3, 1917, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning
26 January 1, 1918, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of the revenues derived from railway operations while under Federal control * * *."

The act of September 8, 1916, 39 Stat. 756, imposed an income tax of 2 per cent upon the entire net income of every corporation received from all sources. The war coming on, the revenue act increased the tax to 4 per cent by the act of October 3, 1917, 40 Stat. 300, and again by the act of February 24, 1919, 40 Stat. 1057, called

the revenue act of 1918, war taxes of much higher rates were imposed by the following provisions, in section 230, paragraphs (a) and (b):

"That in lieu of the taxes imposed by section 10 of the revenue act of 1916, as amended by the revenue act of 1917, and by section 4 of the revenue act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates: (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and (2) for each calendar year thereafter, 10 per centum of such excess amount."

"For the purposes of the act approved March 21, 1918, entitled 'an Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an act in amendment of Title I of the revenue act of 1917."

The plaintiff, early in the year 1917, had undergone a reorganization of its corporate affairs, and this fact gave rise to a contention that its operating income for the three years preceding June 30, 1917—the test period established by the statute as a basis for fixing just compensation to the railroads taken over by the Government—did not reflect or furnish a reliable guide for the adjustment of compensation due for the use of its properties. At any rate, during the whole period of Federal control, notwithstanding the report of the Interstate Commerce Commission filed January 16, 1919, disclosing the plaintiff's average annual operating income for the test period above mentioned, the plaintiff and the railroad administration were absolutely unable to agree upon the amount of just compensation due the plaintiff until July 1, 1921. So that as to the entire period of Federal control the plaintiff did not receive from the Government any sum for the use of its properties, except an advancement made by the railroad administration in January of 1920 of $250,000, and upon that sum, as well as other items of independent income, the railroad administration, for the years involved, paid the two per cent normal income tax due from the plaintiff to the Government. The plaintiff, under the terms of the agreement of July 1, 1921, was awarded the sum of $1,800,000 as
27 just compensation. It actually received in cash after the adjustment of prior claims and payments, the sum of $1,570,000. In making its income-tax returns for the year, it was allowed certain deductions, being finally compelled to pay an income tax on $1,064,781.39 as accrued in the year 1921, the Internal Revenue Bureau first holding that the income assessed accrued during the period of Federal control, this ruling being reversed by the committee of appeals and review, holding the same as income for the taxable year 1921.

The defendant, in its contention, does not seek to escape or disavow liability for the payment of the two per cent normal income tax assessed against the plaintiff's income for the taxable years 1918, 1919, and two months of 1920, and as a matter of fact the defendant paid the same. Defense is now made to liability for the tax upon the sole and single basis that there exists no statutory obligation to pay the tax involved upon the income of the plaintiff for the year 1921, a period subsequent to Federal control, when the properties themselves had been returned to the plaintiff and were being operated independently of the railroad administration. The argument is supported almost wholly upon the fact of plaintiff's insistence before the Internal Revenue Bureau that the sum received from the defendant in 1921 was income for the year 1921. We are not primarily concerned with what the Bureau of Internal Revenue did with reference to the time when income accrues for income taxation. The question of liability of the plaintiff for the payment of war taxes is not now before us. Our concern with respect to the present issue is, Who is liable for the payment of the tax, and what correlative rights and liabilities generated from the acts of Congress authorizing the taking over of the railroads in this respect. If the statutes governing the subject imposed upon the Government the legal obligation to pay during the period of Federal control the taxes, other than war taxes, assessed against the plaintiff's income for that period, or assessed upon the revenues or any part thereof derived from operation, it would seem in reason and authority, the liability does not cease because the extent of the obligation was not fixed until after the period of control expired. It is no less a legal obligation though delayed in its discharge.

The just compensation paid to the plaintiff in 1921 was not income earned by the railroads by their independent operation during the year 1921. It was from funds accruing to the Government during its control and operation of the railroads, income from the operation of the plaintiff's railroads earned by the defendant while under the management and operation of the defendant. The defendant would, in accord with its construction of the law, have paid the two per cent normal tax ultimately assessed against this sum if the same, like the $250,000 advanced and deducted therefrom, had been paid during the period of Federal control. The $250,000 advancement was a recognition of liability and obviously an admission that an indeterminate sum was then due the plaintiff, which, under the circumstances, was not then ascertainable, but which would subsequently be fixed and paid. This is exactly what was done.

Section 1 of the Federal control act, heretofore cited, authorized the President to "agree" with and "to guarantee" the railroads making operating returns to the Interstate Commerce Com-
28 sion a sum equivalent, or as near thereto as may be, to its average annual operating income for the three-year test period, as just compensation for the use of its road. The second paragraph of this statute, in language quite too plain to be misunderstood, ex-

presses and assures the railroads another guarantee, a positive assurance that the railroads willing to so agree shall be entitled to receive the sum guaranteed as just compensation undiminished and in nowise depleted by the assessment or payment of any Federal taxes accruing during the period of Federal control, except war taxes. Surely this language can have no other meaning and intent: "Other than taxes assessed under Federal or any other governmental authority for the period of Federal control, or any part thereof, either on the property used under such Federal control, or on the right to operate as a carrier, or on the revenues, or any part thereof, derived from operation * * *."

This was not the single inducement to encourage amicable settlements as to just compensation. On the contrary, the President was empowered to make certain advance payments of the same to the railroads with or without such an agreement. Such was the character of the $250,000 paid to this plaintiff in 1919, and upon which the Government paid the 2 per cent income tax assessed against the same. As a matter of fact the entire statute, from beginning to end, clearly reflects a legislative intent to relieve the railroads from the payment of any Federal taxes, except war taxes, during the time the income from their properties became the property of the Government, and was as to railroads charged with no other burden except the payment of just compensation for the use of the property taken over. The legislation was an indisputable recognition of the constitutional rights of the railroads to receive just compensation, and afforded each of the parties an immediate and complete remedy and opportunity to bring the issue to a permanent end.

Section 10 of the original Federal control act, 40 Stat. 451, declares the absolute ownership of the Government of all the income derived from the operation of the railroads by the Government. Manifestly, the Government was to pay no income tax thereon, and the railroads, of course, in the meantime, received no income from this source, except the payment of just compensation. Having, therefore, lost their properties for the time being, and likewise lost their operating income, the Government assumed the very just obligation of reimbursing the incident loss of making the companies, as near as may be, whole by paying to them a sum ascertainable in the way prescribed, and free and unincumbered by obligations to the payee as to Federal taxes not in their nature war taxes. Congress approved this policy. The act of March 21, 1918, cited above, imposed upon the carriers the payment of any Federal taxes accruing under the act of October 3, 1917, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January 1, 1918, or any part of such period. Obviously, we need but mention the fact that the original revenue act imposing income taxes was in no sense a war measure. The increase of rates due to war conditions subsequently impressed the legislation with this character, and Congress, by the act of February 24, 1919, 40 Stat. 1057, in section 230, marked out

with precision the line of demarkation between peace and war
29 time rates by providing with reference to the operation of the railroads taken over by the Government that only five-sixths and four-fifths, respectively, of the vast increase in income-tax rates should be treated as levied by an act in amendment of Title I of the revenue act of 1917, a most positive and pronounced recognition of the rights of the railroads with respect to income taxes accruing under the act of October 3, 1918, and the liability of the Government for the payment of all Federal taxes due from the railroads to the Government during the period of Federal control, except as therein mentioned. If the impossibility of recourse to other factors in this case existed, this legislation, we feel certain, is sufficient in itself to confirm beyond peradventure the opinion of the court that the Government beyond question assumed and guaranteed to the railroads operated during Federal control that the compensation to be paid them as just for the use of their properties, would be a sum free and undiminished by governmental tax exactions, other than war taxes.

The defendant seeks to avoid liability by a most insistent assertion that the plaintiff is in effect asserting a contention that an income tax was levied against the railroad administration and the income derived by the Government from the operation of the railroads. Whatever may be the defendant's conception of the plaintiff's argument, the very antithesis of this situation impresses us. Under the statutes defining the rights and liabilities of the parties a mutual right of contract was accorded. Whether the defendant gained or lost by the settlement was, with the exception of the provisions as to the test period as a basis of fixing compensation, a matter of negotiation and contract. When the contract was consummated the sum agreed upon became a governmental liability, a fixed and definite consideration payable to the railroad and obviously income of the railroad. When it became income of the railroad the revenue acts applied and liability for the income tax accrued. Therefore, the only question involved is, under the terms of the law and the contract, which one of the parties assumed the payment of the tax. The statutes of 1918 and 1919 increasing income-tax rates clearly and unmistakably disclose that the two per cent normal income tax herein claimed was not a war tax. The defendant so construed the legislation and acted consistently upon its own construction of the law.

Aside from all that has been said, the defendant in this case entered into a written contract of settlement with the plaintiff. On July 1, 1921, the contract annexed to the petition was executed by the parties. Section 3 of this contract, we repeat here by way of emphasis, provided: "The settlement does not include the obligation of the director general assumed in paragraph (i) and (j) of section 4 of said standard contract to save the company harmless as to claims, if any, of third persons, or the obligations of the director general in respect to the payment of taxes under Section 6 of the contract." Section 6 of the standard form of contract expressly

provided that the railroad was to be saved harmless from the payment of all Federal taxes except war taxes. It even extended the obligation to the payment of expenses by the defendant, in the event of litigation respecting the same. This contract was made under the authority given by sections 202–203 of the transportation act of 1920, a statute extending, and in some respects amplifying, the act of March 21, 1918, an act which accorded the right of contracting for the final adjustment of all claims of the railroads, just compensation included, subsequent to the period of Federal control, a legislative grant of authority to the President to "adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature, arising out of or incident to Federal control." The terms of this final agreement indicate an appreciation of the justness of the settlement, an intent of the Government to deal fairly with the railroad. During the whole period of Federal control the income derived from the operation of the railroad was the property of the Government. The plaintiff had no right, title or interest therein. Manifestly, it was not the intent of Congress to impose upon the income thus accruing to the Government an income tax which would be, in effect, but transferring the tax so levied from one pocket to another. Neither would it have been fair and equitable to levy against the railroads the normal peace time income tax assessable against funds paid to the railroad as just compensation, and thus diminish what was their due. Just compensation would not have been awarded by paying in one moment the sum agreed upon as such, and in the next retrieving a substantial portion thereof by way of taxation. The sum paid to this plaintiff as just compensation accrued to it during the period of Federal control; it was a right incident to and growing out of the period of Federal control; it was inseparably annexed to the transaction of governmental operation of the railroad, formed a part of this particular period of time, and related to and was included within the laws respecting the reciprocal rights of the parties incident to the taking over of the railroads. It is a tax assessed against the revenues derived from operation, for that is the source of its accumulation. It may not be divorced from this transaction, although ascertained in amount and paid subsequent to the period of actual accumulation.

The purpose of the transportation act of 1920 was to enable the President to continue after, as he had been empowered previously, the negotiations and contracts for the settlement of liabilities accrued in virtue of the various statutes defining the rights of the parties during the period of Federal control. A task of such magnitude imposed by the law was not capable of complete settlement within the limit of Federal control. The contract thus made follows without deviation the statutes which fixed the rights and liabilities of the parties, and recognizes without equivocation the legal obligation to make the railroad whole as to just compensation, and confirms the practice of the Railroad Administration and what was

done under the laws. The obligations of the railroad respecting taxation during the period of Federal control is what the statutes deal with. This was the subject matter of the contract, and is what was settled by its terms, irrespective of the date. In our opinion, under both the law and the contract, the plaintiff is entitled to recover.

Judgment for plaintiffs in the sum of $21,295.62, with interest thereon as allowed by law. It is so ordered.

Graham, Judge; Hay, Judge, and Downey, Judge, concur.

31 VI. *Judgment*

May 4, 1925

At a Court of Claims held in the city of Washington on the 4th day of May, A. D. 1925, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of twenty-one thousand two hundred and ninety-five dollars and sixty-two cents ($21,295.62), with interest thereon as allowed by law.

BY THE COURT.

VII. *Petition for appeal*

Filed July 17, 1925

From the judgment rendered in the above-entitled cause on the 4th day of May, 1925, in favor of claimant, the defendants, by their Attorney General, on the 17th day of July, 1925, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HERMAN J. GALLOWAY,
Assistant Attorney General.

32 VIII. *Order allowing appeal*

It is ordered by the court this 16th day of November, 1925, that the defendant's application for appeal be and the same is allowed.

IX. *Petition for a cross-appeal*

Filed July 21, 1925

From the judgment rendered in the above-entitled cause on the 4th day of May, 1925, in favor of claimant, the claimant on the 21st day of July, 1925, makes application for, and gives notice of, a cross-appeal to the Supreme Court of the United States.

HARVEY D. JACOB,
Attorney of Record.

X. *Order allowing cross-appeal*

It is ordered by the court this 16th day of November, 1925, that the plaintiff's application for a cross-appeal be and the same is allowed.

33 [Clerk's certificate to foregoing papers omitted in printing.]

34 In Supreme Court of the United States

October term, 1925

THE UNITED STATES, APPELLANT *v.* THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, a Corporation; The West Side Belt Railroad Company, a Corporation.	No. 864

Statement of points to be relied upon and designation by appellant of parts of record to be printed

Filed Jan. 4, 1926

The appellant, United States, intends to rely upon the following points:

(1) That the Court of Claims erred in holding and determining that section 1 of the Federal control act of March 21, 1918 (41 Stat. 451), created an obligation on the part of the United States to pay the 2% normal income tax provided for in the internal revenue act of 1916 (39 Stat. 756), as amended by the internal revenue act of 1917 (40 Stat. 302) and the internal revenue act of 1918 (40 Stat. 1075–1076), levied and assessed on that portion of the incomes of the Pittsburgh & West Virginia Railway Company and its subsidiary, the West Side Belt Railroad Company, for the year 1921, representing compensation paid to said companies by the Director General of Railroads in July 1921, for the use of their railroad
35 properties by the United States during the period of Federal control of railroads, January 1, 1918, to February 29, 1920.

(2) That the Court of Claims erred in holding and determining that by and pursuant to the terms of the final settlement agreements between the Director General of Railroads and the Pittsburgh & West Virginia Railway Company, and its subsidiary, the West Side Belt Railroad Company, dated July 1, 1921, covering the use of the railroad properties of said companies during the period of Federal control of railroads by the United States, the United States became obligated to pay the 2% normal income tax provided for in the internal revenue act of 1916 (39 Stat. 756), as amended by the internal revenue act of 1917 (40 Stat. 302) and the internal revenue act of 1918 (40 Stat. 1075–1076), levied and assessed on that portion of the incomes of the said companies for the year 1921, representing compensation paid to them in the year 1921 by the director general,

pursuant to said final-settlement agreements for the use of their said railroad properties by the United States during said period of Federal control, January 1, 1918, to February 29, 1920.

(3) That the Court of Claims erred in holding and determining that the tax levied and assessed on that portion of the incomes of the Pittsburgh & West Virginia Railway Company and its subsidiary, the West Side Belt Railroad Company, for the year 1921, received from the Director General of Railroads in said year, as compensation for the use of their railroad properties during the period of Federal contol by the United States, was a tax on revenues derived from operation of said railroad properties.

36 (4) That the Court of Claims erred in failing and refusing to dismiss the second amended petition.

(5) That the Court of Claims erred in holding and determining that the United States is liable on the alleged causes of action set out in said second amended petition.

(6) That the Court of Claims erred in entering judgment in favor of plaintiff below.

(7) That the Court of Claims erred in entering judgment against the United States.

It is requested that the entire transcript of record be printed, the entire record being deemed necessary in the presentation of the points relied upon by appellant, the United States.

WILLIAM D. MITCHELL,
Solicitor General.

[File indorsement omitted.]

37 In Supreme Court of the United States

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, a Corporation; the West Side Belt Railroad Company, a Corporation, appellant *v.* THE UNITED STATES	No. 865

Statement of points to be relied upon and designation by appellants of record to be printed

Filed Jan. 13, 1926

This is to acknowledge receipt by me of the following documents in the above-entitled cases:

(2 copies) Statement of points on which the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company, appellant, intends to rely, and designation of parts of the record to be printed.

Received this 13th day of January, 1926.

WILLIAM D. MITCHELL,
Solicitor General.

38 STATEMENT OF POINTS ON WHICH THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY, APPELLANTS, INTEND TO RELY, AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Appellants, the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company, intend to rely upon the following point:

That the Court of Claims erred in refusing to enter judgment in favor of appellants for the reasonable expenses of prosecuting the suit, including attorney's fees.

The amended petition alleged in paragraph 2 of the second count that appellants were entitled under the law and the contract to counsel fees and other expenses in connection with the suit.

Requested finding of Fact VIII asked the court to find that a reasonable sum for such attorney's fees and expenses up to the date of judgment of the court below was $5,000.00, and the
39 requested conclusion of law was that the court should include in its judgment such sum. The court omitted such a finding and failed to include such an amount or any other amount in its judgment, although it was stated in the opinion that the contract "even extended the obligation to the payment of expenses by the defendant in the event of litigation respecting the same (the taxes involved)."

It is requested that the entire transcript of record be printed. The record includes the testimony of only one witness, together with a stipulation of facts. While it is felt that the entire record is not necessary for the proper presentation of the point relied upon by these appellants, it is thought that it is necessary in the presentation of the points relied upon by the United States in its appeal and for a proper reply on behalf of these appellants to the argument to be made by the United States.

HARVEY D. JACOB,
Attorney for Appellants,
the Pittsburgh & West Virginia Railway Company
and the West Side Belt Railroad Company.

[File indorsement omitted.]

[Indorsement on cover:]

File Nos. 31,587, 31,588. Court of Claims. Term No. 864. The United States, appellant, vs. the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company. Term No. 865. The Pittsburgh & West Virginia Railway Company, and the West Side Belt Railroad Company, appellants, vs. The United States. Filed January 4th, 1926. File Nos. 31,587, 31,588.

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